5-24-1976

Commonwealth of Kentucky, Department for natural Resources and Environmental Protection, et al v. Western Reserves Oil Co., et al

Appellant's Brief 1976-SC-0398

APPELLANT'S BRIEF

559 SW 2d 486

SUPREME COURT OF KENTUCKY

FILE NO. 76-398

**COMMONWEALTH OF KENTUCKY
DEPARTMENT FOR NATURAL RESOURCES
AND ENVIRONMENTAL
PROTECTION, ET AL ..... APPELLANTS**

**VS. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE SQUIRE N. WILLIAMS, JR., JUDGE**

WESTERN RESERVES OIL CO., ET AL .... APPELLEES

BRIEF FOR APPELLANTS
**COMMONWEALTH OF KENTUCKY
DEPARTMENT FOR NATURAL RESOURCES
AND ENVIRONMENTAL PROTECTION**

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(Certificate of Service on inside of front cover)

CERTIFICATE OF SERVICE

I hereby certify that the herein BRIEF FOR APPELLANT was mailed, postage prepaid to the Honorable A. Robert Doll, the Honorable Ronald D. Ray, Greenebaum, Doll, Matthews, and Boone, 3300 National Tower, Louisville, Kentucky 40202, the Honorable Lively M. Wilson, and the Honorable Winfrey P. Blackburn, Jr., Stites, McElwain, Fowler, 3400 First National Tower, Louisville, Kentucky 40202, this the 24th day of May, 1976.

ALAN L. HARRINGTON
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MAY IT PLEASE THE COURT:

STATEMENT OF THE QUESTIONS PRESENTED

I

DID THE TRIAL COURT ERR IN ITS CONSTRUCTION OF KRS 146 BY FAILING TO DISTINGUISH BETWEEN A PROPERTY RIGHT OR INTEREST AND THE REASONABLE REGULATION OF THE "USE" OF THAT PROPERTY RIGHT OR INTEREST?

II

DID THE TRIAL COURT ERR IN REQUIRING COM-

PENSATION TO BE PAID WHEN THE ACTIONS OF THE COMMONWEALTH OF KENTUCKY WERE BASED ON A VALID EXERCISE OF POLICE POWER?

III

DID THE TRIAL COURT ERR IN REQUIRING COMPENSATION TO APPELLEES IN THE ABSENCE OF A FINDING BY THE TRIAL COURT THAT A "TAKING" HAD OCCURRED IN THE CONSTITUTIONAL SENSE?

IV

DID THE TRIAL COURT ERR IN NOT REQUIRING APPELLEES TO APPLY TO THE DEPARTMENT, CONSISTENT WITH KRS 146, FOR PERMISSION TO CONDUCT THEIR CONTEMPLATED ENVIRONMENTAL ACTIVITIES WITHIN THE BOUNDARIES OF THE WILD RIVER IN QUESTION?

STATEMENT OF THE CASE

This appeal arises from the entry in the Franklin Circuit Court of an Opinion and Judgment which declares KRS Chapter 146, the "Wild Rivers Act", to be constitutional but requires the Commonwealth to proceed to compensate a landowner "immediately upon the Commonwealth obtaining an injunction prohibiting use of any land in contravention of the Wild Rivers Act."

The General Assembly had, in 1972, enacted the "Wild Rivers Act". This legislative scheme is set out in KRS 146.200 -- KRS 146.990. The purpose of the General Assembly as elucidated in KRS 146.220 was to:

. . . establish a wild rivers system by designating

> certain streams for immediate inclusion in the system and by prescribing procedures and criteria for protecting and administering the system. It is *not* the intent of KRS 146.200 to 146.350 *to require or to authorize acquisition of all lands or interests* in lands within the exterior boundaries of the stream areas but to assure preservation of the scenic, ecological and other values and to provide proper management of the recreational, wildlife, water and other resources. (Emphasis added)

In June of 1975, upon information and investigation, the Department for Natural Resources and Environmental Protection, ascertained that Western Reserves Oil Company, a non-resident corporation operating in this state by and through C. G. Collins of Campbellsville, Kentucky, was conducting gas-mineral drilling operations along Rock Creek in McCreary County within the boundary of a said Wild River, to wit Rock Creek, as established in KRS 146.240 and KRS 146.250. Specifically, the environmentally oriented activities were occurring on Rock Creek between the White Oak Junction Bridge and the Kentucky-Tennessee border.

Western Reserves Oil Company, through its agent C. G. Collins, failed to procure any approval, acquiescence, or authorization from the Secretary of the Department for Natural Resources and Environmental Protection for its environmental activities within the boundaries of the designated stream area of Rock Creek as required by KRS 146.220 and KRS 146.290.

An action was filed by the Appellant in Franklin Circuit Court in June of 1975, praying for injunctive re-

lief against the Appellees, Western Reserves Oil Co., and C. G. Collins. A restraining order was obtained prohibiting certain activities within the confines of the designated Wild River boundary.

The Appellants filed an Amended Complaint and procured an amended restraining order which more carefully delineated the scope of the prohibited activities within the area in question. The amended restraining order prohibited the Appellees from:

> conducting gas-mineral drilling and/or mining operations and/or the constructing of roadways incident thereto and/or the cutting of timber and the creation of any other unnatural disturbance along Rock Creek in McCreary County within the boundaries of said wild river as established in KRS 146.250.

Appellees moved to dissolve the restraining order and the amended restraining order and dismiss Appellant's complaint. Appellant moved to abate this action pending a determination by the then Court of Appeals in *Commonwealth of Kentucky, et al* vs. *Morris Stephens, et al,* said case being now pending in the Kentucky Supreme Court in File No. 75-1050, 75-1099, and 75-1177.

On January 23, 1976, the Honorable Squire N. Williams, Jr., Franklin Circuit Court issued its Opinion and Judgment, which, in part overruled Appellees' motion to dismiss, granted Appellees' motion to dissolve the restraining order and the amended restraining order, overruled Appellants' motion to abate, and granted the Appellants a temporary injunction temporarily restraining and enjoining Appellees from engaging in the activities which were the subject of this action.

The Judgment of the Court also stated that the Wild Rivers Act was constitutional and that:

> (w)ith the entry of this judgment, the Commonwealth of Kentucky, shall forthwith initiate proceedings either by condemnation or otherwise, to compensate the defendants for their interest in the real property which is affected by the temporary injunction . . . .

Appellants moved to stay the enforcement of the Court's Judgment during the pendency of the appeal of this matter. The Court granted Appellant's motion for a stay pending final determination by this Court. Notice of Appeal was filed from the Court's Judgment on March 4, 1976.

The essence of this appeal revolves around the proper statutory construction and interpretation of KRS Chapter 146 as such construction relates to the intent of the General Assembly. The Commonwealth maintains that the trial court was in error in its construction of the Wild Rivers Act, inasmuch as the Court seemed to find no significant difference between a property "interest" and the corresponding "use" of that interest.

Appellant asserts that an "interest" in property is that interest which must be compensated if a "taking", in the constitutional sense, occurs. However, the reasonable regulation of the "use" of one's property, as contemplated by the Wild River Act, is a valid exercise of the police power of this state and as such does not require compensation. The trial court, though, failed to make this distinction.

If the Wild Rivers Act is considered in its entirety the ascertainment of the legislature's intent for this Act to fulfill a comprehensive plan of land use planning in an environmentally feasible area will be readily apparent.

The appeal also raises the question of whether the actions of the Commonwealth in seeking injuctive relief prohibiting the activities within the boundaries of the Wild River, prior to an application being made by the Appellees for permission to conduct certain activities pursuant to KRS 146, constitute a valid exercise of the inherent police power of the state to protect, preserve, and enhance the environmental milieu of this pristine area as delineated in the Wild Rivers Act.

Further, in the context of the case at bar, if compensation to Appellees is to be forthcoming as the trial court mandates, it would seem that some determination must be made as to whether there has been a "taking" in the constitutional sense. This the trial court failed to do.

This Court is now the final arbiter as to the construction of the Wild Rivers Act. Appellants urge the Court to effectuate the intent of the legislature, namely the enactment of a needed environmental measure with ascertainable standards of a comprehensive land use plan for the preservation of a part of Kentucky's heritage.

ARGUMENT I

THE TRIAL COURT ERRED IN ITS CONSTRUCTION OF KRS CHAPTER 146 BY FAILING TO DISTINGUISH BETWEEN A PROPERTY "INTEREST" OR "RIGHT" AND A REASONABLE REGULATORY PLAN FOR THE REGULATION OF THE "USES" OF A PROPERTY OWNER'S "INTEREST" OR "RIGHT".

The obvious concern contemplated by the Legislature in its enactment of the Wild Rivers Act was the fear of what uncontrolled, unfettered, commercial and or industrial development would do to the traditionally scenic, untrammeled, aesthetic qualities of the proposed Wild River Areas. The legislative scheme propounded to effectuate this purpose was one designed to provide flexibility as well as concern for the rights of all citizens.

In those instances where the regulatory scheme was so onerous as to amount to a "taking", in the constitutional sense, compensation was mandated, KRS 146.280. However, as long as one's property, interest or right is not being taken but only the "use" of such property, interest, or right is being regulated by definitive ascertainable standards, the landowner has no complaints as it relates to compensation. It must be remembered that all property interests and rights are held subject to the reasonable regulation of such interests for the general welfare of its denizens. *O'Bryan* v. *Highland Apt. Co.*, 128 Ky. 282, 108 S.W. 257 (1908), *Mutual Loan Co.*, v. *Martell*, 222 108 225 (1911); *Commonweath* v. *Alger*, 7 Cush. 53 (Mass. 1853. This idea was ever present in the concerted action taken by the General Assembly to facilitate the

passage of this environmental measure which is now before this Court.

What makes this case somewhat unique is that it occupies that area of legislative endeavor which is relatively new, namely environmental legislation. Since the beginning of the decade the world has become more conscious of the environmental degradation which occurs around us daily. Shrinking natural resources and the need to protect and preserve what has made this country strong become prime considerations in an overall legislative plan.

This Court has been a forerunner in sustaining the purposes for which environmental legislation was enacted. *Jasper* v. *Commonwealth*, 375 S.W. 2d 209 (Ky. 1964). Thus, with this in mind, Appellants urge this Court to carefully consider the entirety of the Act in question in order to ascertain the significant difference between an interest that is compensable and a use which is not.

The Commonwealth asserts that the Appellees and the trial court below have completely misconstrued the import of KRS 146 as delineated by the language of the statute itself.

In order to derive the legislative intent of the Wild Rivers Act one must consider the statutory framework in its entirety rather than merely seeking the intent of the statutes from selected phrases and paragraphs. *City of Owensboro* v. *Noffsinger*, 280 S.W.2d 517 (Ky. 1955); *Department of Motor Transportation* v. *City Bus Co.*, 252 S.W.2d 46 (Ky. 1952); *Department of Revenue* v.

Miller, 199 S.W.2d 622 (Ky. 1947); *Kentucky Tax Commission* v. *Sandman,* 18 S.W.2d 407 (Ky. 1945); *Oates* v. *Simpson,* 174 S.W.2d 505 (Ky. 1943).

It must be remembered that the enactment of the Wild Rivers Act was to accomplish a basic purpose that is the effectuation of an overall environmental concern for the natural resources of this Commonwealth, a heritage which all Kentuckians are slowly losing as the expansion of commercialism becomes a reality of life even in our more rural areas. Consistent with this purpose KRS 146 must be given that construction consistent with the overall purpose. *Barrett* v. *Stephany,* 510 S.W.2d 524 (Ky. 1974); *Perry* v. *Commerce Loan Co.,* 383 U.S. 392 (1966); *Kentucky Region Eight* v. *Commonwealth,* 507 S.W.2d 489 (Ky. 1974); *City of Bowling Green* v. *Board of Education of Bowling Green Independent School District,* 443 S.W.2d 243 (Ky. 1969); *City of Louisville* v. *Helman,* 253 S.W.2d 598 (Ky. 1953).

One aspect of the legislative intent, defined in KRS 146.220, must be given close scrutiny in regard to the issue of acquisition of property and any possible compensation therefor. KRS 146.220 states in part:

> It is *not* the intent of KRS 146.200 to 146.350 *to require or authorize acquisition of all lands or interests* in lands within the exterior boundaries of the stream areas but to assure preservation of the scenic, ecological and other values and to provide proper management of the ecological and other values and to provide proper management of the recreational,

wildlife, water and other resources. (Emphasis added)

It seems apparent from the aforementioned language that the Act did not contemplate authorization to acquire all property interests within the boundaries of the Wild Rivers system. As indicated by the language of the intent section, the major thrust of the Act is one of preservation and management of the resources of the designated areas.

Since the Legislature expressed its will by emphasizing that all lands or interests in land *will not* be acquired, it would seem that some feasible alternative to acquisition must have been considered by the General Assembly. The contemplated alternative to acquisition was the reasonable exercise of the police power consistent with the standards established within the framework of KRS 146. Such alternative will be discussed more fully later.

The reasonableness of the exercise of the police power as an alternative to acquisition was never addressed in the lower court inasmuch as the trial court assumed that once the Department took any affirmative action to preserve the natural state of the area in question, compensation was statutorily required.

A reasonable regulatory plan of land uses within the boundaries of the Wild Rivers system is consistent with KRS 146.230 since the statute only requires the acquisition of adjacent lands to streams included in the Wild Rivers system ". . . to the full extent necessary to preserve a true primitive environment in its pristine state." Thus

the *acquisition* of land is only mandated to the extent *necessary* to effectuate the purpose of the Act.

The trial court felt, however, that KRS 146.280(1) was dispositive of the issues presented to the court.

In part, this provision states that "(n)othing in KRS 146.200 to 146.350 shall be construed to deprive a landowner of his property or any interest or right therein without just compensation." However, when KRS 146.280(1) is read in conjunction with KRS 146.280(2) the overall meaning of the two statutory provisions take on an entirely different perspective. KRS 146.280(2) states that "(t)he secretary is authorized to exercise the right of eminent domain only where it is *absolutely necessary* in order to acquire access points or to maintain the character of the area within the meaning of KRS 146.200 to 146.350." (Emphasis added)

From a careful reading of both KRS 146.280(1) and KRS 146.280(2) it would seem that eminent domain is mandated . . . *only where absolutely necessary* and this phrase certainly does not mean whenever any conceivable use of land is denied. To interpret these two provisions any other way would negate the requirement of KRS 146.280(2) that eminent domain be resorted to ". . . only where absolutely necessary." In the trial court's view the absolutely necessary language is apparently nothing more than surplusage.

Had the Legislature wanted every conceivable deprivation of use to be compensable such direction could have been explicity stated, which it was not. Correspondingly, it seems readily ascertainable that eminent domain

is but one tool in an overall regulatory pattern and this tool was only to be exercised where ". . . absolutely necessary . . ."

What would be the purpose of having legislation such as the Wild Rivers Act if every slight deprivation of use was compensable? Would not the Legislature have been on better footing if it had not stated that it was the policy of this Commonwealth for the preservation of the environment that all lands within the designated boundaries of the Wild Rivers be purchased by the State or condemned through eminent domain? Would not this have been a better vehicle to further the purpose of the General Assembly had that been their purpose? The Legislature's statement in KRS 146.280(2) is merely a complementary aspect of KRS 146.280(1). Eminent domain is merely a means to an end, just as the implementation of the state's police power is also one means of facilitating the General Assembly's purpose, namely the protection and preservation of the Commonwealth's environment.

Further, KRS 146.280(1), relied on by the lower court and Appellees, is in conflict with KRS 146.230 which reiterates:

> Within the boundary areas set forth in KRS 146.250, lands adjacent to these streams . . . shall be protected . . . *to the full extent necessary* to preserve a true primitive environment in its pristine state. (Emphasis addad)

Again reading KRS 146.230 with reference to KRS 146.280(1)(2) acquisitions of property by purchase or eminent domain are merely methods by which ". . . a true

and primitive environment . . ." can be maintained. Further such means as acquisitions are, under certain circumstances, merely alternatives to fulfill the mandate of the Act, namely, the use of acquisitions ". . . to the full extent necessary to preserve a true and primitive environment in its pristine state." KRS 146.230.

If the preservation of a ". . . true and primitive environment in its pristine state . . .", KRS 146.230, can be accomplished short of acquisition by purchase or eminent domain the Commonwealth is compelled to do so as indicated in KRS 146.280(2) where the Secretary is commanded as follows:

> The Secretary is authorized to exercise the right of eminent domain only where it is *absolutely necessary* (Emphasis added) in order to acquire access points or to maintain the character of the area within the meaning of KRS 146.200 to 146.350.

The Department strongly maintains that the lower court failed to reach the issue of whether the right of eminent domain was "absolutely necessary" to the overall legislative plan. KRS 146 contemplates acquisition but only after a determination as to the inappropriateness of the exercise of the State's police power. This determination the trial court failed to make.

After considering the apparent differences in KRS 146.230, 146.280(1), 146.280(2), the precept of viewing a statutory framework in its entirety is of greater importance. Correspondingly, any ambiguities which may possibly exist must be resolved to give effect to the total meaning of the act. *Bischoff* v. *Hennessy,* 251 S.W.2d

582 (Ky. 1952); *Griffin* v. *City of Bowling Green,* 458 S.W.2d 456 (Ky. 1970); *Barret* v. *Stephany,* 510 S.W.2d 524 (Ky. 1974); *City of Vanceburg* v. *Plummer,* 275 Ky. 713, 122 S.W.2d 772 (1939).

The final sentence of KRS 146.280(1) is as follows: "Nothing in KRS 146.200 to 146.350 shall be construed to deprive a landowner of his property or any interest or right therein without just compensation. This is merely a restatement of the sound constitutional precept that recognized ownership interests in land can never be taken without just compensation. *City of Ashland* v. *Price,* 318 S.W.2d 861 (Ky. 1959); *Shipp* v. *Louisville and Jefferson County Air Board,* 431 S.W.2d 867 (Ky. 1968), *cert. denied* 393 U.S. 1088.

The trial court, though, seems to have viewed the above quoted sentence as applying to any and all "uses" to which a property owner may conceivably wish to dedicate his property. The lower Court's view fails to consider the nature of the Act, which basically is a zoning oriented land-use planning tool to impose plausible and reasonable restraints, not on one's property ownership or rights but on one's use of that property interest.

It is a well established principal of law that private property rights are held subject to the implied limitations imposed by the state on the use of that property to secure the general safety, welfare, convenience and prosperity of its citizens. *Department for Natural Resources and Environmental Protection* v. *No. 8 Limited of Virginia,* 528 S.W.2d 684 (Ky. 1975); *Goldblatt* v. *Town of Hempstead,* 369 U.S. 590 (1962); *City of Shively* v. *Illinois Central Railroad Company,* 349 S.W.2d 682 (Ky. 1961);

O'Bryan v. *Highland Apt. Co.,* 108 S.W. 257 (Ky. 1908).

The Commonwealth maintains that the regulatory scheme outlined in KRS 146 is a valid exercise of the police power as it relates to the uses of property. The trial court, however, made no determination whatever as to the reasonableness of this exercise consistent with the restrictions placed on the uses of property within the designated boundaries of the Wild River System.

It is a sound constitutional precept that the state cannot confiscate an estate, interest, or property right. However, the difference between an "interest" or "estate" and th *use* of that interest or estate is of paramount importance and is the essence of the case at bar. The Court below did not draw this distinction and as such failed to address the issue of the reasonableness of the land *use* restrictions encompassed in the act. *City of Shively* v. *Central Railroad Company, supra.* The Appellants wish to reiterate that the last sentence of KRS 146.280(1) is nothing more than a restatement of a well established principle of constitutional law and as such in no way whatsoever affects the reasonable exercise of the state's police power, notwithstanding compensation.

A close scrutiny of KRS 146.280(1) reveals that the word "use" does not appear. The trial court has held that the act was constitutional thus upholding the validity of KRS 146.290, which establishes certain prohibitions as to the use of certain property. Therefore if the legislative restrictions in KRS 146.290 are valid, it would seem that certain uses could be prohibited consistent with KRS 146.280(1).

There is no statutory mandate in KRS 146 that uses

have to be compensated. This proposition does not appear in any statutory language and if it had been the *intent* of the Legislature to compensate every "use", this concept could have been made abundantly clear by simple legislative fiat.

The regulatory procedures envisioned by the General Assemby and elucidated in the Act itself must be viewed in the context of the recently awakened environmental consciousness in this country. *Hamilton* v. *International Union of Operations Engineers,* 262 S.W.2d 695 (Ky. 1954). In the last five years there has been a marked change in public attitude toward environmental concerns. These concerns have been reflected in many state legislatures including the Kentucky General Assembly. However, after the electorate's views are extrapolated into legislation, it is, many times, left to the Judiciary to give meaning, vibrance, and character to the statutory framework in the context of present day society. *Folks* v. *Barren County,* 232 S.W.2d 1010 (Ky. 1950).

The Department, therefore, urges this Court to give meaning to the distinction drawn in KRS 146 between the "taking" of an interest and the regulation of a "use".

ARGUMENT II

THE ACTIONS OF THE COMMONWEALTH OF KENTUCKY TAKEN PURSUANT TO KRS 146.200 - KRS 146.990 ARE A VALID EXERCISE OF THE POLICE POWER OF THIS STATE AND AS SUCH REQUIRE NO COMPENSATION FOR STATUTORY RESTRICTIONS PLACED ON LAND "USES".

The police power is that power inherent in every

state to enact laws to protect and provide for the health, morals, safety, and general welfare of all persons within the respective jurisdiction. *Mutual Loan Co.* v. *Martell,* 222 U.S. 225 (1911). A more modern view of the confines of the police power is expressed in *Miller* v. *Board of Public Works,* 195 Cal. 477, 243 P. 381 (1951), where the court stated at page 383:

> . . . (T)he police power, as such is not confined within the narrow circumspection of precedents, resting upon past conditions which do not cover and contest present day conditions . . . that is to say, as a Commonwealth develops politically, economically, and socially, the police power likewise develops, within reason, to meet the changes and changing conditions."

Thus, the poice power is a vibrant, flexible, ever changing concept whose continued vitality depends on the recognition by the Legislature as well as the Judiciary of the changing social, political, and economic realities of life which make such concept essential.

Initially, it should be recognized that the Wild Rivers Act has as its primary thrust the exercise by the Department of the police power of this state for the reasonable regulation of certain specified land uses.

The Appellants concede that certain restrictions and limitations imposed by statute may be of such nature as to be confiscatory. However before the issue of whether a regulatory scheme approaches a "taking", in the constitutional sense, it must be determined if the regulatory scheme is reasonable in scope and whether such standards are of such nature that the restrictions placed on the uses

of property affects only the peripheral indicia of ownership i.e. uses for particular purposes, and not the substance of ownership.

In recent years the Supreme Court of the United States has greatly expanded the interpretation of the "general welfare" aspect of the police power. *Berman* v. *Parker,* 348 U.S. 26 (1954); *Village of Belle Terre* v. *Boraas,* 416 U.S. 1 (1974). In line with this more expansive interpretation the trend of state court decisions has been to become more receptive to the idea of aesthetics as a proper basis for land use regulations. *Jasper* v. *Commonwealth,* 375 S.W.2d 709 (Ky. 1964); *Scott* v. *State,* 541 P.2d 516 (Ore. 1975).

KRS 146.290 specifically outlines regulatory guidelines as to the nature and extent of environmentally oriented activities within the confines of the Wild Rivers.

Additionally KRS 146.220 states in part that:

> (f)or *aesthetic,* as well as ecological reasons, the *foremost priority* shall be to preserve the unique character of those streams in Kentucky which still retain a large portion of their natural and scenic beauty, and to present future infringement on that beauty by impoundments or other *manmade works.* (Emphasis added)

In *Goldblatt* v. *Town of Hempstead,* 369 U.S. 590 (1962) the Court in commenting on whether prohibition of land uses is a valid service stated that the term "police power" connotes the time-tested conceptional limit of public encroachment upon private interest. Except for the

substitution of the familiar standard of "reasonableness", this Court has generally refrained from announcing any specific criteria.

Goldblatt, supra, revived the classic statement of the rule set out in *Lawton* v. *Steele,* 152 U.S. 133 (1894), at page 137 which is still valid today:

> To justify the State in . . . interposing its authority in behalf of the public, it must appear, first, that the interest of the public . . . require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.

Even this rule is not applied with strict precision for it has often been said that "debatable questions as to reasonableness are not for the courts but for the Legislature . . ." *Whitney* v. *Johnson,* 37 F. Supp. 65 at 66, Aff'd, 314 U.S. 574 (1941).

However, even a court that applied this rule strictly upheld a state law which prohibited use of tidal ands, declaring that the exercise of the police power was reasonable saying:

> Chapter 792 is not in violation of the *Lawton* rule. (It) does not benefit a particular class; rather, it benefits all citizens of Maryland. The means utilized are reasonably necessary in light of the potential harm as testified to at trial by experts for both parties.

Potomac Sand & Gravel Co. v. *Governor of Maryland,* 226 Md. 358, 293 A.2d 241, at 249 (Md. 1972).

In so holding the court went on to note that it is "a valid exercise of the police powers . . . for the state to preserve its exhaustible natural resources." *Potomac Sand & Gravel Co.* at 248. "The current trend", said the court, "is to consider the preservation of natural resources as a valid exercise of the police powers", *Potomac Sand & Gravel Co.* at 249.

Thus, it is clear that the application of the police power for the protection of an environmental interest does not represent a novel or untested concept. In addition, the former Kentucky Court of Appeals addressed itself to environmental concerns in an even more limited concept by upholding the implementation of police power as it relates to aesthetic considerations. This Court in *Jasper* v. *Commonwealth,* Ky., 375 S.W.2d 709 (1964) stated at 711:

> The obvious purpose of this Act is to enhance the scenic beauty of our roadways . . . While there may be a public safety interest promoted, the principal objective is based upon aesthetic considerations. Though it has been held that such considerations are not sufficient to warrant the invocation of the police power, in our opinion the public welfare is not so limited . . . .
>
> The police power is as broad and comprehensive as the demands of society make necessary . . . . It must keep pace with the changing concepts of public welfare . . . .
>
> The policy to be followed in promoting the public welfare is a legislative matter. If there is a legitimate basis for the policy, the courts may not question it . . . .

In KRS 146.220 the General Assembly specifically delineated its purpose in establishing a Wild Rivers system and stated in part that:

> . . . For aesthetic as well as ecological reasons, the foremost priority shall be to preserve the unique primitive character of those streams . . .

Thus, the Kentucky legislature expressed specifically that aesthetic reasons were to be protected for the public welfare. Clearly *Jasper* v. *Commonwealth, supra,* demonstrates a broadening of the police power in this area.

The court below recognized and adopted the applicability of *Jasper* v. *Commonwealth, supra,* to the present case by stating the following:

> The court of Appeals in *Jasper* v. *Commonwealth,* Ky., 375 S.W.2d 709 (1964) recognized the police power of the Commonwealth to be broad enough to encompass legislation based upon aesthetic considerations. The avowed purpose of this Act is to enchance aesthetic as well as ecological consideration."

It, thus, seems apparent that the Legislature contemplated an aesthetic basis to the regulation of the areas in question. Again this basis for the exercise of the state's police power was never addressed by the trial court and as such the efficacy of such exercise based on aesthetic qualities is a crucial issue which must be determined before any consideration of compensation should be made.

The former Kentucky Court of Appeals stated in the case of *Commonwealth* v. *Kelly,* 236 S.W.2d 695 (Ky. (1951) as follows:

> . . . (t)hat an interference with the legally protected use to which land has been dedicated, which destroys that use or places a substantial and additional burden on the landowner to maintain that use is a taking of his property.

In utilizing the above stated test as to the reasonableness of the present land use plan contemplated by KRS 146, the Court must ascertain the uses to which the land has been dedicated as well as whether there has been such an enormous burden placed on those uses by the Commonwealth's actions as to be confiscatory in nature.

In the case at bar, the Commonwealth has not terminated an ongoing use of the land in question but has merely prevented the dedication of this pristine area to a commercial and or industrial use.

The Wisconsin Court in looking to the intent of a shoreline zoning ordinance prohibiting the filling of shoreline property, affirmed the posture that one must look to the present use to which the land has been dedicated. The Court stated:

> The shoreland zoning ordinance preserves nature, the environment, and natural resources as they were created and to which the people have a present right. The ordinance does not create or improve the public condition but only preserves nature from the despoilage and harm resulting from the unrestrictive activities of humans. *Just* v. *Marinette County*, 56 Wis. 207, 251 N.W.2d 761, at 771 (1972).

It is obvious from a cursory examination of the Wis-

consin Court's analysis of the zoning ordinance that said ordinance closely parallels the Kentucky General Assembly's intent in KRS 146.220, namely, to ensure that the designated stream areas be maintained in their natural, scenic, and aesthetically pleasing states. KRS 146.220 states in pertinent part:

> . . . for aesthetic, as well as ecological reasons, the foremost priority shall be to preserve the unique primitive character of those streams in Kentucky which still retain a large portion of their natural and scenic beauty, and to prevent future infringement on that beauty by impoundments or other manmade works.

If the exercise of the police power is to have any effective significance the power must be viewed broadly enough to accomplish the environmental purposes for which the legislation was enacted. Massive commercial and or industrial development within the boundaries of the Wild Rivers, in and of itself, requires a liberal construction of the legislative standards used for the exercise of that power to properly regulate the uses of property due to the relative ease with which the environmental balance of the area can be drastically changed within a very short time.

The Department urges that the limitation of the use of Appellee's property is a valid exercise of the police power and is not a taking requiring compensation to those who would attempt to benefit financially at the expense of the natural resources of this Commonwealth.

ARGUMENT III

THE TRIAL COURT FAILED TO DETERMINE IF A "TAKING" IN THE CONSTITUTIONAL SENSE HAD OCCURRED AS A RESULT OF APPELLANTS' ACTIONS AND UNTIL SUCH DETERMINATION IS MADE THE DEPRIVATION OF A "USE" IN PROPERTY CONSISTENT WITH THE POLICE POWER IS NOT COMPENSABLE.

The trial court avoided any questions relating to whether the enforcement of the Wild Rivers Act constituted a "taking" in the constitutional sense. The Department maintains that no "taking" has occurred which would require compensation, but the issue was never addressed in the lower court.

The Commonwealth contends that the legislative scheme of KRS 146 establishes the necessary standards to exercise the police power of the State, in certain instances, totally independent of any requirement for compensation.

Only when the land use restrictions laid down by the Legislature become so unreasonable and overreaching does such a plan begin to infringe upon constitutional proscriptions found in both the United States and Kentucky Constitutions. The Commonwealth maintains that, in the case at bar, this point has not been reached and no determination whatever has been made by the court below as to the reasonableness of the regulatory plan as it relates to the specificities of Appellees' activities.

The lower court seemed to feel that once *any* action was taken by the Department some type of compensatory action must be immediately forthcoming on the part of

the state. The trial court's posture does not follow if the Act is viewed in its totality.

Granted, the Wild Rivers Act contemplates compensation but compensation *only* when and if the regulatory pattern of land use restrictions established by the legislature are so onerous as to constitute a "taking". The determination of whether a "taking" has occurred was avoided by the court below, however, the Appellants urge that some determination as to a "taking" *must* be made before the acquisition of any land is statutorily or constitutionally required.

ARGUMENT IV

THOSE WHO CONTEMPLATE ENVIRONMENTALLY ORIENTED OPERATIONS WITHIN THE BOUNDARIES OF A WILD RIVERS AREA MUST APPLY TO THE DEPARTMENT FOR NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION, BEFORE ANY ACTIVITIES COMMENCE, FOR PERMISSION TO CONDUCT THE SPECIFIED ACTIVITIES CONCONTEMPLATED.

This action was originally initiated in response to the activities of Appellees, to wit, gas-mineral drilling operations, in an area designated by statute to be a "Wild Rivers" Area by KRS 146.240. This unregulated and unapproved activity was clearly in violation of the intent of the Act and as a result the Department sought appropriate injunctive relief in an attempt to forestall further irreparable environmental damage to this scenic area.

It is inherent in the language of the statute that prior to the commencement of such aforementioned activities, the Appellees must apply to the Department for a deter-

mination as to whether the proposed activities are permissible in the Wild Rivers Area and for permission to conduct the same.

KRS 146.290 which encompasses the various land uses permitted within the bounds of the Wild River Area, states:

> Utility lines or pipe lines shall not be constructed *unless* approved by the Secretary in writing and under provision that the affected land be restored as nearly as possible to its former state. (Emphasis added).

Reading the language of KRS 146.290 in conjunction with the Legislature's intent it seems apparent that the Act contemplates the filing of an application with the Department outlining the nature and extent of the proposed operations of Appellees. However, the application procedure must be instituted *before* any activities commence otherwise such procedure would be meaningless.

In the case at bar, Appellees did not apply to the Department as required by the Act. This failure to submit an application specifying the nature of the contemplated activities, some or possibly all of which might be permissible under the statute if approved by the Secretary, effectively precludes any demand for compensation by the Appellees.

In effect, since Appellees have not complied with the mandate of KRS 146 by failing to request permission from the Department before proceeding with their environmental activities, they have effectively waived any complaints with respect to compensation.

Correspondingly, the issues before this court are not ripe and will not be until such time as Appellees have submitted an appropriate application to be considered by the Department. Only after the Commonwealth has made a final determination as to the appropriateness of the proposed operations, consistent with KRS 146, will the issues now before this court be ripe for judicial consideration. *Goodwin* v. *City of Louisville,* 215 S.W.2d 557 (Ky. 1948); *Myers* v. *Bethelehem Shipbuilding Corporation,* 303 U.S. 41 (1938).

CONCLUSION

The Commonwealth has stated its position with respect to the construction of KRS 146. The Department feels that the Wild Rivers Act is a valid response by the elected officials of the citizens of this state to meet an environmental concern, namely the protection, preservation, and enhancement of the environmental heritage of Kentucky.

The Department has outlined the bounds and scope of the inherent police power which all states exercise on behalf of the general welfare of its citizens. It is imperative to remember that the concept of police power must be flexible if such concept is to maintain its viability by meeting the problems and challenges precipated by an ever changing society.

The General Assembly, within the bounds of KRS 146, has enacted a legislative scheme which seeks to alleviate environmental degradation within the confines of a restricted land use framework.

The restrictions placed on uses of property are precisely that - restrictions on *uses* and not on one's ownership rights or interests. The Act contemplates compensation in some instances if absolutely essential to effectuate the purpose of the act, but these circumstances are not before this Court.

In order to facilitate the protection of the delicate environmental equilibrium, the Department must have strong regulatory authority to meet the monumental challenges of the day.

For the above stated reasons, the Commonwealth respectfully requests the Court to sustain the Department's exercise of the police power as a valid land use regulatory scheme thereby negating any necessity for compensation for the restrictions placed on certain uses of property.

Alternatively, if the Court decides that the Act mandates compensation even for the restrictions on uses of property, the Department asks this case be remanded to the trial court for a determination as to whether a "taking" has occurred in the constitutional sense, such determination being an essential requisite before compensation is required either statutorily or constitutionally.

Additionally, if this Court finds the police power is not sufficient in and of itself short of compensatory proceedings, and further feels that no determination needs to be made by the trial court as to whether a "taking" has occurred, the Department urges this Court to remand this

case to the trial court for further proceedings inasmuch as Appellees did not apply to the Department for permission consistent with KRS 146.290, thereby failing to exhaust all appropriate administrative remedies.

Respectfully submitted,

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